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In the

Supreme Court of the United States

MARK SUSSMAN, KER GERRIN, PERY CARTER, SIMONE LUND, VANESE MCNEIL, AMIN A. FARUQI, BETTY KOSS, ROBERT BOZOYAN, LILIAN HEDRICK, EVANGELINE RAGASA, CHRISTOPHER ROGERS, PATRICIA HOPKINS, DERRICK C. LESHURRE, DEANNA WILLIAMS, CANDICE A. DONOFRIO, CLAYTON A. MCVICKER,

Petitioner,

versus

AMERICAN BROADCASTING COMPANIES, INC., THOMAS ALBERT OETGEN, STACY LESCHT, IRA ROSEN, RICHARD KAPLAN, WALTER PORGES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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ISSUE PRESENTED

Does 18 U.S.C. §2511(2)(d), which prohibits illegal electronic eavesdropping, immunize a defendant who commits a tort or a crime if there was an intent to gather the news? The issue is one of first impression for this Court and the decision below creates a split as three other circuits provide a different rule. *Compare* the instant case with *Desnick v. American Broadcasting Companies, Inc.* 44 F.3rd 1345, 1353 (7th Cir. 1995), which held that when a state or federal crime or tort occurs in the context of secret taping, a violation of the eavesdropping statute has occurred; *Menda Biton v. Menda* 796 F. Supp. 628 (D.P.R.1992), *corrected*, 812 F. Supp. 282 (D.P.R. 1992) *and partial summ. judgment granted, in part, case dismissed, in part*, 812 F. Supp. 283 (D.P.R. 1993), and *Deal v. Spears* 780 F. Supp. 618. (W.D. Ark. 1991)

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Deceit and violence --- these are the two forms of deliberate assault on human beings.

Imagine a society, no matter how ideal in other respects, where word and gesture could never be counted upon. Questions asked, answers given, information exchanged --- all would be worthless. Were all statements randomly truthful or deceptive, action and choice would be undermined from the outset. There must be a minimal degree of trust in communication for language and action to be more than stabs in the dark. That is why some level of truthfulness has always been seen as essential to human society , no matter how deficient the observance of other moral principles. Even the devils themselves, as Samuel Johnson said, do not lie to one another, since the society of Hell could not subsist without truth any more than others.

A society, then, whose members were unable to distinguish truthful messages from deceptive ones would collapse, individual choice and survival would be imperiled. The search for food and shelter could depend on no expectation from others. A warning that a well was poisoned or a plea for help in an accident would come to be ignored unless independent confirmation could be found.

All our choices depend on our estimates of what is the case; these estimates must in turn often rely on information from others. Lies distort this information and therefore our situation as we perceive it, as well as our choices. A lie, in Hartmann's words, "injures the deceived person in his life; it leads him astray."[1]

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[1] S. Bok, *Lying: Moral Choice in Public and Private Life* (1978), at 18-19, footnotes omitted. Sissela Bok, a medical doctor teaching ethics at the Harvard Medical School, is one of the finest, most interesting scholars on privacy, and the ethics of lying, you will ever read.

Liars are persuaded by their own excuses to a degree that seems incredible to others.[2]

OPINIONS BELOW

The opinion of the United States Court of Appeals of the Ninth Circuit is reported at *Sussman v. American Broadcasting Companies, Inc.*,186 F. 3d 1200 (1999). The opinion of the district court is reported at *Sussman v. American Broadcasting Companies, Inc.*, 971 F. Supp. 432 (C.D. Cal. 1997).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals was entered August 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2511

STATEMENT OF THE CASE

American Broadcasting Companies, Inc. ("ABC") asked the district court and the Ninth Circuit Court of Appeal to gut the federal wiretapping statute, to say it has no teeth, and they did. As long as there was an allegedly altruistic purpose to commit a crime, the lower courts ruled, then the federal eavesdropping statute does not apply. This is not the intent of Congress [3], and in any event, ABC committed numerous crimes and torts in this case, which it cannot rebut.

STATEMENT OF THE FACTS

ABC is the most notorious abuser of the right of privacy in the United States, and is criticized by virtually every scholar writing on the subject.[4] This is a fascinating case involving the ubiquitous

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[2] *Id.* at 86.

[3] Judge O'Scannlain wrote of the act in *United States v. Smith*, 155 F. 3d 1051, 1056 (Ninth Cir. 1998).

> When the Fifth Circuit observed that the Wiretap Act "is famous (if not infamous) for its lack of clarity," *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457, 462 (5th Cir. 1994), it might have put the matter too mildly.

[4] Consider the breadth of negative law review articles concentrating on ABC's

and highly profitable hidden camera of television news magazines, the modern form of Christians and lions journalism, where the "defendant" is tried, convicted and sentenced in absentia in front of 15-20 million Americans, an electronic stockade.[5]

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tactics. Smolla, "Will Tabloid Journalism Ruin the First Amendment for the Rest of Us?" 9 *Journal of Art and Entertainment Law* 1 (1998); Lidsky, "Prying, Spying and Lying: Intrusive Newsgathering and What the Law Should Do About It," 73 *Tulane Law Review* (1998); Logan, "Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering," 83 *Iowa L. Review* 161 (1997); Logan, "'Stunt Journalism,'" Professional Norms and Public Mistrust of the Media," 9 *University of Florida Journal of Law and Public Policy* 152 (1998)[hereinafter *Stunt Journalism*]; Comment, "Get That Camera Out of My Face! An Examination of the Viability of Suing 'Tabloid Television' for Invasion of Privacy," 51 *Univ. of Miami L. Rev.* 936 (1997); Comment, "Trash Tort or Trash TV?: Food Lion, Inc. v. ABC, Inc., And Tort Liability of the Media for Newsgathering," 72 *St. John's Law Review* 185 (1998); Walsh, Selby, & Schaffer, "Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages For Publication of Ill-Gotten Information." 4 *William & Mary Bill of Rights Journal* 1111 (1996); Wade, "The Tort Liability of Investigative Reporters," 37 *Vand. L. Rev.* 301 (1984); Note, "Intrusion and the Investigative Reporter," 71 *Tex. L. Rev.* 433 (1992).

[5] *Stunt Journalism* points out at 9 *U Fla. J. of L. and Public Policy* at 155-156, that

> The present age of undercover newgathering really took off in 1989, when the newsmagazine PrimeTime Live (PTL) premiered on ABC, and became known for its use of hidden cameras as a reporting tool. [fn. 43, Barry Meier & Bill Carter, "Juries Slap Down TV Journalists' Methods, *Pitt Post-Gazette*, Dec. 24, 1996, at D1; see also Canellos, {ABC Ordered to Pay $5.5 M to Food Lion Award Seen as Rebuke to Media, *Boston Globe*, January 23, 1997 at A1} "In its relatively low-rated first season, the show broadcast two undercover pieces. Thereafter, it sharply increased the number of hidden-camera segments, until they averaged more than 20 per season. Ratings went up."]

Stunt Journalism continues, 9 *U Fla. J. of L. and Public Policy* at 165:

> Undercover stories are good for ratings. [fn omitted] Stunts are broadcast to attract viewers and are prevalent during "sweeps" periods, so that higher advertising rates can be charged.[fn. omitted] When PTL runs a hidden camera report it most likely is the lead story. [fn. 111, Samuels {"SU Prof Testifies in Food Lion Trial," *Syracuse Herald-Journal*, Jan. 24, 1997, at A34}. Of 80 original stories using a hidden camera that were featured on PTL between August 1989 and September 1996, 61 led the broadcast.] These reporting methods are themselves considered a marketing tool, as advertisements for television newsmagazines often emphasize the techniques used to gather a story, alongside the substance of

We are all aware that so-called television newsmagazines, spearheaded by ABC, which is embroiled in litigation over this issue, have declared war on the right of privacy, and seek to have the right to spy on others via hidden cameras because they make a lot of money doing so. This case is important, as the Ninth Circuit has eviscerated the federal statute on privacy and interpreted it in a way that makes impossible for anyone ever to bring an action — because all a journalist has to do to win is say he is a journalist with a good intent to be protected.

The plaintiffs here worked in management or as psychic readers for the Psychic Marketing Group ("PMG"), which offered services via a 900 number. ABC mounted the equivalent of an espionage operation for the purpose of smearing them, although they did nothing unlawful or illegal, and did sue, ultimately causing massive ruination. The district court dismissed the instant case on motion for summary judgment, taking the most conservative approach possible.

On June 24, 1999, the California Supreme Court unanimously ruled (the undersigned was prevailing lead counsel) **that the conduct complained of in this case constituted the tort of intrusion**, upholding a jury verdict of the same effect, for another victim of the same conduct complained of in this case. *Sanders v. American Broadcasting Companies, Inc.*, 20 Cal. 4th 907 (1999). The plaintiffs in this case were all co-workers with Mr. Sanders at PMG.[6]

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of the story itself. [fn omitted]

Stunt Journalism explains that journalists cannot really call themselves members of a profession because (1) there is no formal training; (2) clients cannot adequately evaluate the quality of the services rendered; (3) there is no sublimation of self-interest to the public good; and (4) there is no self-regulation. *Id.* at 157-158.

[6] This case is about private searches and seizures by an entity that thinks it is beholden to no one. The only "crime" of the plaintiffs was their belief they could read tarot cards and tell fortunes. ABC has literally declared war in this case on the right of privacy of Americans and the people of California, and publicly stated this as being their position.

> Cox, *National Law Journal*, December 27, 1993, page 35:
> Representing ABC, Andrew M. White of Century City's Christensen, White, Miller, Fink & Jacobs declined to discuss the [*Sanders*] case which is in pre-trial discovery. But he stated he believes the legal projections afforded the press are "quite clear." *If there is any evolution in the near future, he adds, it will be a shrinking of the individual's reasonable expectation of privacy.* (emphasis added)

There had never been any complaints by anybody about the Psychic Marketing Group ("PMG"), but ABC's show, *PrimeTime Live* (now merged into *20/20*), the most notorious abuser of hidden camera journalism, decided it must have been doing something wrong and proceeded to mount the equivalent of a CIA spy operation with secret agents --- independent contractors --- who fraudulently represented who they were, and set up a sting operation, just like a real police department, to try and capture the news. ABC had never received any information that PMG was using a 900 line to deceive the public,

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The fairness of hidden cameras has become a major topic and focus of our society. *Sanders* is the first in America to have gone to trial where a network was sued for the tort of intrusion regarding hidden cameras, the first where compensatory damages were awarded, the first where punitive damages were awarded, and the first where private attorney general fees were awarded. It is irrefutable that ABC made material misrepresentations to get the story, that it used impersonation, and that the jury, when posed the question directly, found that Sanders did have a reasonable expectation of privacy at the time he was secretly taped.

In the last two decades, network television newsmagazines in a never-ending search for ratings which translates into revenues, have declared war on the right of privacy we all enjoy as Californians and Americans. The most important newspaper in the United States has written about the increasingly diminished standards in journalism. Carter, "It's Crowded in TV NewsMagazines," *The New York Times*, page C1, October 24, 1994; MacGregor, "Diluting the News Into Soft Half-Truths," *New York Times*, June 4, 1995, page 25, Kurtz, "Hidden Network Cameras: A Troubling Trend," *Washington Post*, Page 1, November 30, 1992 (Richard Kaplan, then Executive Producer of *PrimeTime Live* is quoted therein as saying he would like to do a hidden camera story once a week.); Mirabella, "TV's Magazine Shakeout," *Columbia Journalism Review*, March\April 1995; "Hidden Camera, a Million Dollar Peek"; and Lissit, "Gotcha," *American Journalism Review*, which discusses the instant case and many of the issues presented herein. *See also* Lissit, "Out of Sight," *American Journalism Review*, Dec 1994, p. 27, which explains the common ingredients of a news-magazine show: *PrimeTime Live* does "features" (stories with stars, for example), late-breaking news, and "investigative pieces," and hidden camera stories because they are cheap and easy to produce, especially when there is no need to get the point of view of the victim thereof.

Consider Barringer, "Telling a Journalistic Coup from a Crime," *New York Times*, July 26, 1998, Section 4, page 1, which observes that reporters' ethics are

> out of step with a public that is angry about sensationalism, grand jury leaks and the press's perceived arrogance. Journalists who take little time to explain why the tawdrier side of their work may be necessary can pay a price; lawyers who put the news media's ethics on trial are finding receptive juries.
>
> ...Breaking the law is almost universally taboo in the news business.

they just thought that people who called such lines were wasting their money.[7]

Mark Sussman was[8] a Vice-President at PMG: he was secretly taped in a restaurant by ABC, and defrauded into attending the meeting on false pretenses. Portions of this secret taping were shown on the broadcast. He was also secretly taped in his office with the doors closed.

Mark Sussman, Kerwin Garin[9], Perry Carter, Simone Lund, and Christopher Rogers were all trapped on the hidden camera and featured on the broadcast (the remaining plaintiffs were captured on the hidden camera, but not the broadcast), and their lives were permanently and deleteriously harmed.[10]

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[7] ABC's thesis was that those who worked at PMG were the equivalent of unemployed actresses, and that they tried to keep suicide callers on the line. This was all disproved in the *Sanders* case, and the jury (whose foreman was the Mayor of El Monte, and a very conservative group of people) came back with a collective award in excess of $1,000,000, including substantial punitive damages on the tort of intrusion.

This was a carefully orchestrated scheme, like *The Truman Show* (think about it, it's chillingly close, only this is real life), to star whomever ABC could snag in a production the victims had no idea they were making, and it is all supposed to be O.K. because ABC was literally inventing the news, acting as protagonists, as agent provocateurs. The ending and the script were written long in advance for ABC's little morality play; it just needed to find some unwitting "heavies." ABC needs ratings, and has an inexorable need to fill-up its airwaves with "villains" of its own choosing, people who in this and many other cases, are doing absolutely nothing wrong. This is the case of where ABC went "fishing," hunting for human game to blast on TV, more grist for the television newsmagazine mill, another opportunity to tout its broadcast with "another hidden camera report." ABC's sad position is that as a matter of law, the workplaces of California have become the new sound stages for *PrimeTime Live* and those of its ilk.

[8] PMG ultimately went out of business; it became unprofitable after the broadcast.

[9] Sussman and Garin were plaintiffs, but were precluded from the federal claims because of the statute of limitations. All told, the story ruined the lives of hundreds of persons, none of whom committed any unlawful acts of any nature; they were simply "easy pickings" for a network that doesn't like fortunetellers, yet its subsidiaries and affiliates run advertisements for them. Perry Carter, Simone Lund, Amin A. Faruqi, Betty Koss, Robert Bozoyan, Lilian Hedrick, Evangeline Ragasa, Christopher Rogers, Patricia Hopkins, Derrick C. LeShurre, Deanna Williams, and Candice A. Donofrio are the only remaining plaintiffs and petitioners. Koss, Bozoyan, Hedrick, Ragasa, Hopkins, Williams and Donofrio were not depicted on the broadcast, just secretly taped.

[10] Perry Carter, an African American with a Doctorate in Education from Indiana University, had a complete mental breakdown as a result of the taping, losing all long term memory, can no longer work, his marriage broke up, and he is living on state aid.

The right of privacy is one of the most important rights known to man, and it revolves around a simple concept — that every human being who walks the earth is entitled to dignity.

ABC's story was a classic hatchet job — it was factually incorrect, and violated numerous fair standards and practices in journalism — and the story was as unfair a story as has ever been published.[11]

Mark Sussman was the supervising executive on the West Coast for the PMG, where some of the hidden camera filming occurred and the object of the ABC investigative report, and directly supervised Vanese McNeil and Simone Lund. The remaining plaintiffs were all psychic advisors at PMG.

ABC is, of course, one of the three major television networks in America produced the report which is the subject of this action. It taped hundreds of hours of footage at PMG's offices in Baltimore and Los Angeles.

Thomas Albert Oetgen ("Oetgen"), an ABC employee, was the producer for the Report. Bob Calo ("Calo") also produced the report. Stacy Lescht ("Lescht") had previously been a college intern for *PrimeTime Live* in Washington, D.C., and was unemployed when hired to become a hidden camera spy and paid-imposter for ABC for the Report.

Ira Rosen ("Rosen") is employed by ABC and was a Senior Producer for the Report; he is the leading producer of hidden camera

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Rogers suffered enormous mental distress, humiliation and shunning. LeShurre became homeless as a result of the secret taping. The other plaintiffs tell similar stories. Florence Cloud, originally a plaintiff, passed away during these proceedings. She was filmed as ABC pulled its "raid" — just like Elliot Ness in the days of old — when it barged in on the closed offices of PMG so it could film some ambush interviews, and terrorize those who worked there. She testified that ABC caused her to lose her best friend of 50 years, and to be humiliated in the community.

[11] People visit psychics seeking a religious or quasi-religious experience, and sometimes they just want someone to talk to about their love-life, dreams and\or wishes. (The broadcast actually criticized PMG and Perry Carter because he had told Lescht on the hidden camera that the company sold "hope," as if there was something wrong with that.) ABC's smirking haughtiness about those who believe in the psychic world is evident throughout this and the related cases, and the underlying theme of the broadcast is that those who profess to be psychic should not be allowed to do so. The California Supreme Court long ago determined that psychics are protected by the First Amendment in *Spiritual Psychic Church v. City of Azusa*, 39 CA. 3d 510, 217 Cal. Rptr. 225 (1985). In other words, the plaintiffs were engaged in a **protected activity**, making the intrusion and fraud all the more outrageous.

Executive Producer for the Report.[12] Walter Porges ("Porges") was the executive in charge of program and practices at ABC who authorized the filming by hidden camera.

The PMG was a business which provided information services over a "900 telephone number." *See* R[13]370:1-2 The offices of Psychic Marketing Group were private and not open to the public. There was a reception desk and receptionist to intercept uninvited visitors. The company had a strict "no visitors" policy. All defendants were aware of this policy. *Id.* 3-7

ABC produced a television program entitled *PrimeTime Live*, which utilizes a news style and purports to broadcast investigative reports. It is the habit and custom of ABC News generally and PrimeTime Live correspondents, cameramen, and investigators to use hidden cameras to titillate their audiences, with *PrimeTime Live* under the guise of "investigative journalism," thus usurping the role of the District Attorney or police department, who are required to obtain search warrants. The subjects of the story have no opportunity to present their point of view; this is what is so fundamentally offensive and inhuman about hidden camera invasions. It is the equivalent of the district attorney being the trier of fact, with the defendant absent and not even aware he is on trial. *PrimeTime Live* intentionally violated and violates the ethical rules of journalism, the California *Penal Code* and the *United States Code*. Defendants have a mind-set toward invading the privacy of citizens, because doing so provides titillating journalism and because viewers like seeing persons caught on hidden cameras.

ABC placed Stacy Lescht, their investigative reporter (but in reality then an unemployed and recent college graduate, who last heard from, sold shoes at the Baltimore women's store, Ann Taylor), "undercover" as part of the "Hello Telepsychic" Investigative Report at the premises of Psychic Marketing Group. At the same time, ABC placed one or more hidden cameras on the premises at Psychic Marketing Group to surreptitiously record the activities and conversations of those who work there. These cameras were trained

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[12] Rosen and Kaplan were both individually found liable for punitive damages by the *Food Lion* jury, reversed on other grounds , *Food Lion Incorporated v. Capital Cities*, ABC,) __ F. 3d 1999, WL 957738 (4th Cir, N.C.)

[13] "R" stands for "Record."

on the plaintiffs and recorded the plaintiffs' activities and conversations while they worked. Playing the "part" of a newly transferred employee from the Baltimore office, Lescht approached virtually every employee at the Psychic Marketing Group and sought to elicit personal information about them, which they would not have otherwise divulged had they known Lescht was in reality a spy and imposter whose intent was to "expose" them and harm them and embarrass them in front of 20 or so million Americans. *Id.* 370:26-371:15.

ABC mounted at least four separate invasions of privacy and utilizations of the hidden camera. ABC's thesis, which was unsupported and proven to be false in the *Sanders* case, was that those who were psychics were unserious about their work, and were the equivalent of unemployed actresses. ABC made no attempt to obtain legitimately, by ordinary journalistic methods, the information it sought to prove, and did not follow accepted journalistic standards for the utilization of hidden cameras, to the extent there even are any.[14] ABC made no meaningful attempt to gauge the harm that would be caused by the utilization of the hidden cameras, and the episode was an economic and mental holocaust upon those who were depicted in the episode, and literally destroyed the lives of many of the plaintiffs and damaged permanently the relationships they have with other third parties. *Id.* 371:16-372:5.

In or about the last week of August 1992, Mark Sussman was falsely told by Oetgen that Oetgen was a bona fide investor looking to go into business with PMG, and a lunch meeting was set up at the tony Peninsula Hotel in Beverly Hills. Sussman was secretly taped at this meeting by Oetgen and Hill. There were no customers at any other tables, and Sussman had a reasonable and complete expectation of privacy.

Shortly thereafter, Oetgen and Hill attended a meeting in Sussman's office where Sussman was also taped and the door was shut.

ABC's report took comments out of context and portrayed employees of PMG as engaged in frivolous activity with money as

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[14] An extensive article, with much original reporting, about ABC's tactics in the instant case is Gunther, "Hidden Camera, Hidden Agenda," *Detroit Free Press*, Section H, page 1, May 14, 1995.

their only motivation and without a good faith belief in their psychic abilities.

Defendants' conduct is in direct contradiction to express public policy in California. California has codified its public policy of making the act of recording confidential communications unlawful under *Penal Code* §632, and defendants' actions have violated that law. Defendants have ignored this important public policy consideration, continued with their behavior in a reckless manner, and also violated their own internal policies. ABC has repeatedly admitted it gave no thought to the effect that the broadcast would have on the lives of those captured by the hidden camera, albeit Richard Kaplan has admitted being captured on the hidden camera is per se indicative of wrongful conduct.[15]

The eavesdropping was carried out by Lescht as the actual taper, under the guidance of Oetgen and ABC producer, Calo. Ron Hill and Steve Bell also participated in hidden camera taping: they make their living as professional mercenary spies for television networks.

At the trial of *Sanders*, portions of which were lodged with the district court, the following testimony was elicited, establishing that ABC did have the motive and intent to commit crimes and torts in using the hidden camera, and the conduct of the participants in the same was bereft of any concern for any of the plaintiffs in this or that case. We summarized it for the district court:

> Testimony of Richard Kaplan
>
> Richard Kaplan was the Executive Producer at PrimeTime Live who authorized the hidden camera taping. He testified that when he approved the hidden camera, he had no idea what was going to be filmed, indicating complete recklessness on his part. TR[16]3091:1-4. Kaplan goes on to state that the plaintiffs in Kersis (as also the plaintiffs in the present action) were not the focus of the story, that the "culprits" were the persons who set up the psychic phone line. 3099:5-16; 3101:6-9.

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[15] The complaint also alleged spoliation of evidence of out-takes and transcripts.

[16] "TR" is the transcript in the *Sanders* trial.

Kaplan demonstrated a complete intention to commit tortious conduct by admitting that he gave no thought whatsoever to the legal consequences of his conduct, but admitted that he knew the hidden camera taping would be hurtful to those depicted. 3105:6-3106:8; 3110:6-3111:7.

Kaplan admitted that the hidden camera is a "dual-edged sword ... very unpopular with people both in and out of the business because it is **not an America thing. It reeks a little of the KGB. We don't like to be spied on**." (emphasis added) 3111:20-28.

Most importantly, Kaplan admitted wishing to defame the plaintiffs, to "cast aspersions" on them. 3114:3-14.

Kaplan admitted to being aware that Lescht was committing fraud on hundreds of third party callers who were seeking psychic advice, and that ABC was deeply concerned about the fact that she was committing a fraud, but they let her do it anyway. 3117:20-311911.

Finally, Kaplan admitted that being on a hidden camera is per se indicative that the person on camera has committed wrongdoing, in other words, a naked admission that a defamation has occurred. 3122:7-18.

Testimony of Thomas Albert Oetgen

Thomas Albert Oetgen was the producer of the piece. He testified that Lescht's goal was to commit fraud, for her to obtain the trust of those with whom she worked so she could learn information about them. 1601:19-21. Oetgen admitted that the purpose of the broadcast was to defame the plaintiffs, to show they were part of a "scam." 1605:26-1606:4. He admitted to no concern about defrauding the hundreds of callers that Lescht spoke with. 1608:24-1609:7. Oetgen recounted his numerous conversations with Rick Mandler, ABC in-house attorney, indicating that

there were no discussions about the frauds that ABC was committing.. 1610:17-1611-1612:8.

It is established in testimony that the purpose of the broadcast was to commit the tort of false light, with Oetgen admitting that statements were taken out of context to make those who worked at PMG look bad. 1614:18-1620:16.

Oetgen admitted that being on a hidden camera is a per se defamation. 1640:3-14.

Oetgen admits that it is wrong to tape where there are closed doors. 1683:27-1684-5; 1687:24-1688:5. Oetgen admitted that he did not establish or prove any of the key points he was trying to make in the piece. 1695:6-1696:1696:7.

Oetgen admitted that the promotions for the broadcast were defamatory, thus indicating, yet again that the purpose of the broadcast was to defame. 1709:24-1710:6.

Testimony of Stacy Lescht

Stacy Lescht was the ABC spy who utilized the hat-cam to invade the privacy of her co-workers. She testified to having no concern about causing any emotional damage by her conduct. 1773:1773:9-17. She indicated her mandate was to find out any information she could, that she was given essentially no direction, thus undercutting ABC's argument that it did not intend to commit any crimes or torts. 1774:22-1775:6.

Lescht admits that one of her purposes was to steal trade secrets, including the names and phone numbers of customers, and that she successfully completed this task, and to steal the employee handbook by use of a misrepresentation. 1777:16-1779-3.

Testimony of Frederick Steven Mandler

Frederick Steven Mandler is an in-house attorney for ABC. He testified that he told Oetgen not to film in closed areas. 2949:15-21. (**However,**

Oetgen did, which alone should prove intent to commit a tort!)

Mandler admits that it is wrong in California to tape telephone conversations. 2991:2-2992:15. He admits to no thought whatsoever about the propriety of stealing trade secrets, such as the names of customers. 2992:23-2993:2. Mandler admitted it was wrong to tape everyone who worked at PMG and that was not his advice to Oetgen. 3008:12-19. Mandler admits that he was fully aware that Lescht was making misrepresentations and committing fraud but that did not bother him. 3014:28- 3020:15.

Mandler admitted that those depicted at PMG were accused of committing fraud on the show and that ABC had no evidence that any fraud had been committed, thus conceding that a defamation had occurred. 3029:28-3030-12.

Mandler could cite no legal precedent that allowed the taping. TR 22A:3005:14-22. The taping was permissible because people "lie all the time," and the lies of Lescht about a false boyfriend, a false move to Los Angeles, and wanting to be a legitimate psychic were not material lies, but he could not testify with any expertise as to California law on the matter. Id. 3017:11-3019:17.

PROCEDURAL HISTORY

The case was originally filed in the Los Angeles Superior Court on December 21, 199 4. However, to get it away from that tribunal, where it had just lost *Sanders*, ABC removed the case, claiming diversity, and plaintiffs thereafter amended to bring the federal claim which is at the heart of this appeal.

On February 12, 1997, the district court granted summary judgment for the ABC defendants on the federal eavesdropping claim, essentially stating that journalists were exempt from laws of general application when gathering the news. 971 F. Supp 432 (C.D. Cal. 1997)

ARGUMENT

I. IF THIS CASE IS ALLOWED TO STAND, THEN THE FEDERAL STATUTE WILL NO LONGER HAVE ANY MEANING. THE DECISION OF THE COURT OF APPEALS DOES NOT MAKE LOGICAL OR PRAGMATIC SENSE. EVERY MEDIA DEFENDANT FROM NOW ON WILL SIMPLY SAY THAT IT HAD AN ALTRUISTIC PURPOSE WHEN IT COMMITTED THE TORTS AND CRIMES IT DID TO GATHER THE NEWS. IN THIS CASE, THE CALIFORNIA SUPREME COURT UPHELD THAT THE TORT OF INTRUSION WAS COMMITTED. IT IS CERTAINLY A QUESTION OF FACT FOR A TRIER OF FACT TO CONSIDER AS TO WHETHER ABC INTENDED TO COMMIT THESE TORTS IN CONNECTION WITH THE STATUTE. THE ULTIMATE USE INTENDED IS NOT AN INGREDIENT OF THE FEDERAL STATUTE AND THERE IS NO PRECEDENT FOR THIS STRAINED ANALYSIS.

The district court erred in granting a motion for summary judgement on the federal eavesdropping claim, 18 U.S.C. Sections 2511 and 2525. It ruled that ABC was not liable because each surreptitious taping was made by a party to the conversation. Therefore, Plaintiffs may only recover if they can show that the recordings were made for the purpose of committing a criminal or tortious act. *Sussman*, 971 F. Supp 432, 436 (C.D. Cal. 1997)

The district court even went a step farther, making a revolutionary ruling, one unsupported by any case anywhere in the United States, or logic, that the First Amendment somehow immunizes tortious and criminal conduct, in effect, that the First Amendment somehow trumps the right of privacy. *See* footnote 3 of District Court's opinion. *Id.* This is unprecedented in American law and directly contrary to the rule of *Cohen v. Cowles Media,* 501 U.S. 663 (1991), where the Court held that any balancing test was inappropriate where the defendant violated a general rule of applicability having only an incidental impact on newsgathering. *See also, Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692 (1999) the media ride-along case, where the media was held to answer for trespassory conduct, and conduct which violated the Fourth Amendment. The Ninth Circuit, *Berger v. Hanlon*, 188 F. 3d 1155 (1999), recently remanded that case (they are the same cases factually, but involve different parties) for trial. What the Ninth Circuit did in *Berger* is inconsistent with the ruling in this case — there the media was held

for trial with respect to conduct which violated laws of general applicability, yet in this case, the media was not held to such standard. It is anomalous treatment. California is particularly strong in enforcing rights of privacy. See *Shulman v. Group W. Productions, Inc.*, 18 Cal. 4th 200 (1998), where we were *amici curiae* in support of privacy rights.

If the statute must be analyzed as to whether the conversations recorded for the purpose of committing a crime or tort, then here, we have many torts and crimes. Here, much of the taping does not involve any communications at all, it is just secret taping of visual images. This conduct violates the statute. *Doe by Doe vs. BPS Grand Services, Inc.*, 945 F. Supp. 1422 (8th Cir. 1991). While merely taping the plaintiffs, Lescht was <u>not</u> a party to any conversations between herself and any of the plaintiffs, just secretly observing and recording them. No court has analyzed wiretapping in the foregoing context, as to whether there is an exclusion from liability when the person is recording images, as opposed to sound.

The most important words in 18 U.S.C. §2511(2)(d), italicized by us, are:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication ... *unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.*

According to the Ninth Circuit ruling in this case, the determining factor is:

> Plaintiffs here have pointed to no statute or caselaw indicating that it was tortious or illegal for ABC to air the tapings made by Lescht., citing as authority a case which has since been depublished. 186 F. 3d at 1203.

Did Congress really intend this strained interpretation? We've got torts and crimes galore here: intrusion, fraud, intentional infliction of emotional distress, negligent infliction of emotional distress, theft of trade secrets, trespass, and false impersonation, which apparently the Ninth Circuit concedes occurred, but there is no liablity because it may not be a crime or tort to publish information which was obtained by the same, therefore the federal statute is not implicated.

One federal court recently rejected the notion that Federal law on eavesdropping somehow permitted a bootstrap argument that allowed a tort when there was wiretapping: *Tapley v. Collins*, 41 F. Supp 1366, 1369, fn. 5 (So. Dist. Ga. 1999):

> "Because Congress intended to allow the States to supplement [federal law in this area,] .... State law will be preempted only if it conflicts with, or if it is more permissive than, the federal law. Thus, the vast majority of States and the District of Columbia have enacted statutes regulating the interception of oral and wire communications." S.L. Kopecky, *Dealing With Intercepted Communication: Title III of the Omnibus Crime Control and Safe Streets Act In Civil Litigation*, 12 Rev.Litig, 441, 442 (1993) (quotes and footnotes omitted; brackets original and added); see also Ann., *Construction and application of state statutes authorizing civil cause of action by person whose wire or oral communication is intercepted, disclosed, or used in violation of statutes*, 33 ALR4th 506.

The same court noted the absurdity of trying to argue that a crime was ever permitted to establish a crime. *Tapley* at 1377.

Defendants point out that the "right to recover under an invasion of privacy theory is restricted where matters of public interest are involved." *Wilson v. Thurman*, 213 Ga. App. 656, 658, 445 S.E.2d 811 (1994) (quotes and cite omitted); .... *Wilson*, however, is easily distinguishable because the public officials there acted on allegations of criminal conduct conveyed to them by a third party. 213 Ga. App. at 656. In contrast, Collins himself violated federal and State law in producing the very product for which he now claims to have acted in the public interest.

> Like the proverbial "chutzpah" character who murders his parents but then pleads for mercy because he's an orphan, defendant is estopped from claiming that defense here.

Indeed, this Court has refused on other occasions to permit the media to bootstrap, such as using the argument that it can make someone a limited purpose public figure just by giving them unwanted publicity. *Wolston v. Reader's Digest Association, Inc.* 443 U.S. 157,

169, 99 S. Ct. 2701 (1979); *Hutchison v. Proxmire* 443 U.S. 111, 136, 99 S. Ct. 2675 (1979).

ABC committed the tort of intrusion, according to the California Supreme Court and a jury. That apparently is not good enough for the federal statute; plaintiffs must show that the intended use as opposed to the crime/tort of obtaining the illegal booty was wrongful. How did ABC know what it was going to get when it decided to commit the crime? It decided to commit the crime/tort, that should be enough.

The plaintiffs stated valid claims for fraud.[17] Additionally, the following other crimes and torts were committed: intrusion, intentional interference with contractual relations, invasion of privacy (under the California State Constitution), defamation, violation of *Penal Code* Section 632 et seq. and false light — although these were dismissed because of the statute of limitations.[18] However, these are all valid and viable torts or crimes, and just because they have been dismissed because they are outside the statute of limitations, that does not immunize ABC from its tortious and criminal conduct. It was ABC's intent to commit these torts as part of their newsgathering scheme at the time the scheme was conceived. ABC should not now be allowed to avoid liability just because the plaintiffs may have waited to long to press their case against the network for some of their claims. Just because there may have been a failure to prosecute the claims in a timely manner, does not mean that the defendants did not intend the acts they committed.[19]

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[17] ABC's entire defense on this issue was that the claim for fraud was no good because plaintiffs suffered only so-called publication damages. The district court agreed with this, although there was substantial evidence to the contrary. This does not mean the plaintiffs did not suffer damages from the fraud, and even though they may have been barred under that claim because of procedure, they are not barred from asserting the claim under the applicable federal statute, and are entitled at least to nominal damages. Further, many of the petitioners were not even on the broadcast, just taped against their will in a context having nothing to do with ABC's story, let alone any wrongdoing on their part. The Court of Appeals never addressed these issues.

[18] ABC presented no evidence that it had not committed these crimes and torts.

[19] ABC argued that the deletion of the phrase "any other injurious act" from the previous version of the act thereafter allowed journalists to tape conversations in the course of their newsgathering activities as long as they did not make the tape for the express purpose of committing a crime or a tort, *citing Boddie v. American Broadcasting Co., Inc.*, 881 F.2d 267, 268 (6th Cir 1989), but that is exactly the

Desnick v. American Broadcasting Companies, Inc. 44 F.3rd 1345, 1353 (7th Cir. 1995), specifically held that when a state or federal crime or tort occurs in the context of secret taping, then a violation of the eavesdropping statute has occurred.[20] *Menda Biton v. Menda, 796* F. Supp 628, (D.P.R.1992), *corrected*, 812 F. Supp. 282 (D.P.R. 1992) and *partial summ. judgment granted, in part, case dismissed, in part*, 812 F. Supp. 283 (D.P.R. 1993), stands for the same proposition, as does *Deal v. Newell* 780 F. Supp. 618 (W.D. Ark. 1991). Thus, there is now a split of authority between circuits.[21] The *Menda Biton* court's reasoning makes sense, 796 F. Supp at 630:

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gravamen of this claim — **ABC was committing numerous CRIMES AND TORTS**.

The court should understand the procedural history of this case. Prior to modification of the statute, the court held that there was a question of fact as to whether in the context of an interview with a television reporter there was an expectation that the interview was not being recorded, and whether such expectation was justified under the circumstances. *Boddie v. American Broadcasting Companies, Inc.*, 731 F. 2d 333, 338-39 (6th Cir. 1984), *citing Bianco v. American Broadcasting Companies, Inc.* (N.D. Ill. 1979), noted:

> There may be some circumstances where a person does not have an expectation of total privacy, but still would be protected by the statute because he was not aware of the specific nature of another's invasion of privacy.

The later *Boddie* opinion, cited in the main text above, found the "injurious purpose" language unconstitutionally vague and remanded the case for further proceedings but Congress passed the amendment while the case was on remand.

[20] In *Desnick*, however, there were no applicable state or federal torts or crimes pled. Applicable state law did not recognize the tort of intrusion, and the fraud statute differs from that of most other states, requiring a continuing pattern of conduct. That court found no expectation of privacy for "testers" of that doctor's clinic, and there was no right of privacy stated for the corporate plaintiff in that case. This case has nothing to do with testers, but rather the creation of an elaborate sting operation using numerous impostors, numerous misrepresentations by ABC, the obtaining of trade secrets and confidential information under false pretenses.

[21] The Court of Appeals relied upon *Payne v. Norwest Corp.*, 911 F. Supp. 1299, 1304 (D. Mont. 1995) to support its finding, and adopted the same logic; "that the focus is not upon whether the interception itself violated another law; it is upon whether the purpose for the interception — its intended use — was criminal or tortious." This rule does not make sense and will gut the statute. First, what if the illegally obtained video was never shown? That is the case here. There are some 30 hours of surreptitious video taping by ABC, the broadcast is about 13 minutes in length. ABC and any media defendant is always going to say that the intent was to broadcast news, that is why they lied, stole, cheated, defrauded, committed (you name the felony), to obtain the information which turned out to be inconsequential, as here. There was no news in secretly taping the petitioners, no wrongdoing exposed by them

> This statute produces a hybrid criminal offense since it invites state law to define the offense. Therefore, the Court must look to the laws of the Commonwealth to fill in the blanks provided by Congress.
>
> Puerto Rico's legislature deemed a prohibition against wiretapping to be such a cornerstone of Puerto Rican cultural values that it made it part of the Commonwealth's Constitution. P.R. Const. Art. II §§ 10; see *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 485 (1989). As if this were not enough, the Puerto Rican legislature has made it a crime, punishable by imprisonment, to record private conversations without the express consent of all the parties. 33 L.P.R.A. §§ 4186. The legislature has similarly made it a crime to disclose the contents of unconsented recorded conversations. 33 L.P.R.A. §§ 4187. [n2 Other wiretap crimes are also found in Puerto Rico's penal code. See 33 L.P.R.A. §§§§ 4185, 4188, and 4190.] This Court is of the opinion that §§ 2511(2)(d), as it presently reads, applied in conjunction with the Constitution and laws of this Commonwealth, will not permit the use of unconsented wiretapped recordings as evidence in civil proceedings.][n3 The Court is aware, as defendants' attorney pointed out, that there is case law from other circuits which reaches the contrary result. *See cf. Park v. El Paso Board of Realtors*, 764 F.2d 1053 (5th Cir. 1985). This case, however, was decided prior to the 1986 amendment version of section 2511(d)(2), which deleted the words "or for the purpose of committing any injurious act" from the end of the proviso.] Thus, there is a strong likelihood that plaintiff will prevail on the merits of his case.

The tort of violation of the California *Penal Code* §632 for illegal eavesdropping occurs under the California statute at the

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or their company.

moment of the violation; the taping is illegal, as well as an subsequent use. *Ribas v. Clark*, 38 Cal.3d 355, 366, 696, 212 Cal. Rptr. 143 (1985) This is the rule in other circuits, *see e.g. Bess v. Bess* 929 F. 2d 1332, 1335,(Eighth Cir. 1991) and *Deal v. Spears* 780 F. Supp. 618, 625 (W.D. Ark. 1991) (taping of phone conversations to investigate a theft held improper), with that court observing in the latter case:

> No action was taken by either defendant to limit the scope of their intrusion or the privacy of the plaintiffs and the other people whose conversations they recorded.[22]

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[22] The *Ribas* Court quoted with approval from the California Supreme Court en banc case, *Tavernetti v. Sup. Ct.*, 22 Cal.3d 187, 192-193, 148 Cal. Rptr. 883 (1978), which held that California *Penal Code* §631 prohibits:

> three separate acts: (1) intentional wire tapping, (2) willful attempts to learn the contents of communication in transit, and (3) attempts to use or publicize information obtained in either manner." The press can be made subject to restrictions to gather the news. The Supreme Court, upholding the Government's refusal to validate passports for reporters traveling to Cuba wrote that: "The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17, 85 S.Ct. 1271, 1281 (1965).

Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibiting from attending or publishing information about trial if such restrictions are necessary to assure a defendant a fair trial.

> A reporter has "no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." (*The Associated Press v. Nat. Lab. Rel. Bd.* (1937) 301 U.S. 103, 132-133, 57 S. Ct. 650) First Amendment decisions do not stand for the proposition that the press and its representatives are immune from liability for crimes and torts committed in news gathering activities simply because the ultimate goal is to obtain publishable material." (*Nicholson v. McClatchy Newspapers*, 177 Cal.App.3d 509, 518, 223 Cal.Rptr. 58 (1986); *and see Galella v. Onassis* (2d Cir. 1973) 487 F. 2d 986, 995.... A free press is not threatened by requiring its agents to operate within the bounds of basic decency. *Id.* at 996." *KOVR-TV, Inc. v. Superior Court (Whittle)*, 31 Cal.App. 4th 1023, 1032, 37 Cal. Rptr. 2d 431 (1995).

This Court continued with this line of reasoning in upholding a California statute limiting news gathering in California prisons. *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800 (1974). *See also, Houchins v. KQED*, 438 U.S. 1, 98 S.Ct. 2588

Likewise, there was no attempt to limit the taping in any way. ABC had no idea what it was going to discover; it taped hours of people doing nothing wrong. You cannot have a pure intent when there is such willy nilly wholesale taping.

The plaintiffs were **defrauded** by ABC's misrepresentations via its numerous operatives/cub reporters/spies/mercenaries who are masquerading in this Court as journalists. Courts recognize that there is no hidden camera exception for television news magazines, and that for a journalist to misrepresent his or her identity — what occurred here — is simple, common law fraud.[23]

(1978).

And see, Los Angeles Free Press, Inc. v. City of Los Angeles, 9 Cal. 3d 448, 88 Cal. Rptr. 605 (1970), *cert. denied* 440 U.S. 949 (what law enforcement officers considered sociological coverage did not necessarily qualify a newspaper for a press pass.)

Any news gathering right is subject to those general and incidental burdens that arise from good faith enforcement of valid civil and criminal laws. *Reporters Committee v. AT&T*, 4 Med. L. Rptr. 1177 (D.C. Cir. 1978), where it has been held that reporters are not privileged to commit crimes and independent torts in gathering the news, and *the press has no constitutional right of access to information. Nicholson v. McClatchy Newspapers* 177 Cal. App. 509, 521, 223 Cal. Rptr. 58 (1986).

Another extremely interesting case confirming this in another context, is *Ayeni v. Mottola* 35 F.3d 680 (2d Cir. 1994), when CBS reporters accompanied government agents on a bust and this was found to be a violation of the Fourth Amendment. This and related cases are fascinating reading. *U.S. v. Sanusi*, 813 F. Supp. 149 (EDNY 1992) (tape ordered produced), and *Ayeni v. CBS, Inc.*, 848 F. Supp. 362 (EDNY 1994) authored by The Honorable Jack B. Weinstein, author of the leading treatise on federal evidence. The court of appeal wrote that camera crew did not serve "any legitimate law enforcement purpose," and authored the now-classic line that a "private home is not a sound-stage for law enforcement theatricals," and that:

> The purpose of bringing the CBS camera crew into the Ayeni's home was to permit public broadcast of their private premises and thus to magnify needlessly the impairment of their right to privacy. *Ayeni*, 35 F3d at 686.

That's exactly what happened here: the Psychic Marketing Group became a private sound-stage for a news-magazine theatrical. ABC engages in vigilante journalism, conduct which no law enforcement agency can do, and which, if the government had been involved, would have been a violation of the Fourth Amendment.

[23] *Baugh v. CBS*, 828 F. Supp. 745 (1993 N.D. Cal.); *Veilleux v. National Broadcasting Company, Inc.*, 8 F. Supp.2d 23 (D. Maine 1998)(claim for fraud permitted against newsmagazine for false promises about nature of broadcast); *Buller*

To allow a "free pass to get out of jail " because one is a journalist, would eviscerate the federal statute and encourage future intrusions.[24] It would make a fool of the law for a felonious tort-feasor to escape liability merely by uttering the magic words, "I did it to get a story." If that is the rule, then *caveat emptor* for our society. From now on, there will be no federal rule against wiretapping as it

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v. Pulitzer Publishing, 684 S.W. 2d 473 (Mo. 1984)(no consent where, in order to obtain interview with psychic, reporter used pseudonym and otherwise concealed her identity); *W.C.H. Waverly v. Meredith Corporation*, 13 Media Law Reporter 1648 (U.S.D.C. West. Dist. Mo. 1986), held that *it is common law fraud* for a journalist to misrepresent himself to gather the news. In *Natoli v. Sullivan*, 21 Media Law Reporter 2097 (1993)(New York Supreme Court, Oswego County), that court ruled that federal wiretap claims for relief could be pled against a newspaper which had come into possession of illegally obtained wiretaps. ABC just lost again, although it was a pyrrhic victory in *Food Lion, Incorporated v. Capital Cities, ABC*, _ F.3d __1999, WL 957738 (4th Cir. N.C.). Other cases holding that it is wrong to lie to obtain footage are *Copeland v. Hubbard Broadcasting*, (Ct. App. Minn. 1995) 526 N.W. 2d 402; *Belluomo v. KAKE TV & Radio, Inc.* (1979) 3 Kan. App. 2d 461, 596 P.2d 832, 844 [TV station obtained footage under false pretenses, and the Court of Appeal ruled that as to a trespass claim: *"If the purported consent was fraudulently induced, there was no consent."* (emphasis added)]; *Special Forces Ministries v. WCCO T.V.*, 284 N.W.2d 789 (Minn. App 1998) (upholding the denial of a summary judgment motion brought by undercover false employees working for a hidden camera television investigation. They were held to answer for claims of fraud, trespass, and defamation.)

[24] Note the comment to BAJI *(The Committee of Standard Jury Instructions, Civil, of the Superior Court of Los Angeles County, California, 1999 Revision)* § 7.20 which discusses damages in a right of privacy context.

> The gist of the action, unlike defamation, is not injury to character or reputation but to one's feelings and peace of mind and is subjective which **may be more acute than bodily injury**. *Fairfield v. American Photocopy Equipment Co.*, 138 Cal.App. 2d 82, 86 (1955) and *Werner v. Times-Mirror Co.*, 193 Cal.App. 2d 111, 120.(1961) (emphasis added)

The tort in this case was not only the video taping of the plaintiffs; it was also the broadcasting of the pictures. The broadcasting of the pictures constitutes a separate actionable invasion of privacy. There is a difference between keeping a picture in a drawer and broadcasting it on national television.

Further, the conduct is not judged in a vacuum. Pictures were broadcast in a vicious, contrived, blatantly false story concocted to titillate the public and specifically to do damage to those depicted. Tens of millions of people watched a story where these plaintiffs and all who worked at PMG were accused of being swindlers, working for con-men and pimps.

applies to journalists. Moreover, and this case is the perfect example, it will allow wrongdoers to act with outrageous impunity.[25]

We established the elements of intrusion, fraud, trespass, theft of trade secrets, illegal wiretapping under the California *Penal Code*; surely a trier of fact should be allowed to evaluate these facts in light of the federal statute.

It is the act of taping which is wrong, it is irrelevant whether the information was broadcast or intended for broadcast.

Consider the irony, we have established the tort of intrusion and had it confirmed by the highest court in California but that is not good enough! What more are we supposed to do? It's a question of fact for the trier of fact.

There was, until now, no Ninth Circuit authority on the issue, and this is a case of first impression for the United States Supreme Court. In any event, plaintiffs meet any applicable criteria.

ABC even admits in footnote 8 of its brief to the Ninth Circuit, with the testimony of Oetgen, the producer, that there was no other way to get the information sought except by invading the privacy of the plaintiffs. In other words, ABC admits committing the torts of intrusion, fraud, trespass, and theft of trade secrets, of committing a crime to gather the news, classic ends justifies the means journalism.[26]

There was taping of phone conversation by plaintiffs with third parties, which violates *Penal Code* §631(a), prohibiting the taping of telephone conversations. Throughout the tapes, Lescht

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[25] In an action based upon California *Penal Code* § 632 (the state wiretapping statute), in which the defendants asserted the absolute judicial privilege under *Civil Code* Section 47(b), the California Supreme Court held that the privilege does not bar recovery for tortious conduct, regardless of the purpose for which the conduct was undertaken. *Kimmel v. Goland*, 51 Cal. 3d 202 (1990).

Finally, in an analogous situation, one involving *Penal Code* §632, where it was asserted there could be no damages because there was no disclosure, the court of appeal found that this was no bar, especially in light of the legislative mandate to "accord every citizen's privacy the utmost sanctity." *Friddle v. Epstein*, 16 Cal. App. 4th 1649, 1661 (1993).

[26] This Court can take guidance from *Dickerson v. Raphael*, 22 Mich. App. 185, 564 N.W. 2d 85 (1997), where Sally Jesse Raphael and her production company were found liable for surreptitiously taping an individual in a public park, where one of the participants in the taping was voluntarily wearing a microphone.

taped one side of telephone conversations plaintiffs had with third parties. The **purpose** of the taping was to violate the law, literally to tape the plaintiffs having phone conversations. Further, Lescht was not a party to these conversations, and therefore cannot even claim any exemption.

Additionally, the purpose of the hidden camera taping was to obtain trade secrets of PMG, their customer lists, how they did their business, and generally all the information that Oetgen admitted was not available publicly. This violates California trade secret law.
Finally, the testimony of the ABC defendants indicates that the purpose of the hidden camera taping was to defame the plaintiffs. The Court of Appeals never addressed the numerous torts committed, but rather just made a sweeping statement that petitioners did not prove that ABC intended to commit the torts for other than First Amendment purposes!

What it comes down to is this. People don't ever act for the purpose of committing a tort — they do so because they derive some other benefit. Let's say a state law says its illegal to tape without both parties' consent, (as California Penal Code Sec. 632 prohibits) and this occurs. Can a journalist say, "I didn't mean to commit a tort, I only wanted to get my story?" The question then would be whether the First Amendment would bar the claim. If Congress didn't intend for the defendants' actions to be actionable if they rose to the level of a tort, then they would have included language that said if the actions do not rise to the level of a tort or a crime then there would be no action under Federal law. The law of Torts doesn't require one to know if they are actually committing a tort. This Court should have a lot of trouble with the proposition that if you can do something that amounts to a tort or a crime, then it is for the purpose of doing it if you know you are committing it, and it is not for the purpose of doing it if you are mistaken about the state of the law. We can't see how a purpose changes depending on how one is informed or misinformed about the state of the law.

II. THERE ARE IMPORTANT POLICY REASONS WHY THE STATUTE AND THIS CULTURE DOES NOT PERMIT SURREPTITIOUS TAPING, HAVING TO DO WITH FUNDAMENTAL RIGHTS OF PRIVACY AND DIGNITY ACCORDED ALL HUMAN BEINGS.

Let us examine the policy reasons as to why our culture does not want anybody, including the press, making secret tapes. Alan

Westin's *Privacy and Freedom* (1967), is a profound work of scholarship and thought, providing a historical, philosophical and sociological context to privacy. Westin writes about the need for privacy even in the animal kingdom (*Id.* 8-10); the need for privacy in primitive societies (*Id.* at 17). American needs for privacy derive from our national experience in frontier life, freedom from feudal heritage, religious freedoms, and the desire for civil liberty. In democratic societies, privacy exists to provide personal autonomy, (*Id.* at 33), to allow for self-evaluation (*Id.* at 36), and to allow for limited and protected communications, essential to any free society, which has the salutary goals of allowing confidences to be shared with those who are trusted, and to set boundaries in interpersonal relations. (*Id.* at 37-38).

> Just as with individuals. ... organizations need the right to decide when and to what extent their acts and decisions should be made public. *Id* at 42.
> Given the penchant of society for idealized models, privacy is necessary to that organizations may do the divergent part of their work out of public view. The adage that one should not visit the kitchen of a restaurant if one wants to enjoy the food is applied daily in the grant of privacy to organizations for their staging processes. Privacy affords the relaxation which enable those who are part of a common venture, public or private, to communicate freely with one another and to accomplish their tasks with a minimum of social dissembling for "outside" purposes. Without such privacy, the operations of law firms, businesses, hospitals, welfare agencies, civic groups, and a host of other organizations would be seriously impaired. (*Id.* at 45)

Ribas v. Clark, 38 Cal.3d 355, 696, 212 Cal. Rptr. 143 (1985) held that the:

> secret monitoring denies the speaker an important aspect of privacy of communications — the right to control the nature and extent of the first hand dissemination of his statements. *Ribas*, 38 Cal.3d at 362.

Dr. Sissela Bok has written two interesting books which relate to the issue before you: *Secrets* (1982) ["*Secrets*"], 178, and

Lying: Moral Choice in Public and Private Life (1978)["*Lying*"], In *Secrets*, at 255-298, we learn that the media's traditional rationale or excuse for any breach of society's rules is the "public's right to know," which Doctor Bok points out is "rhetorical nonsense."

> Ronald Dworkin has argued ... that the right to speak does not entail or mirror the right to know; at most he holds, it may support a right to *listen,* and thus not have the government interpose obstacles to that *right* between willing speakers and willing listeners. But such a right to listen is "very different from the right to know, because the latter, unlike the former, supposes that those who have the information have a duty and not simply a right to publish it. The Supreme Court has not recognized a right to know as a constitutional right. No one could sue the New York Times for *not* publishing the Pentagon Papers."

Bok details (*id* at 259-262) the exploits of Gunter Wallraff, who obtained employment at a German newspaper under false pretense, and rips him apart. Wallraff had three rationalizations. The first is that his victims were so steeped in deceit and coercion, they cannot be said to complain. Bok points out that this does not justify his methods. His second excuse is that his deceits are small in comparison to the vast conspiracies he uncovered. (*Id* at 262).

> By itself, this argument is also insufficient. No matter how deceitful or lawless the powers that Wallraff hoped to unmask, he might well agree that ordinary reportorial means should be proffered whenever possible. A third argument comes to the support of the preceding two — it claimed necessity. ...
>
> This argument resembles those made for deceit in war. Ordinary channels of correction and control have broken down; law and morality cannot be counted upon; more primitive principles come into operation, justifying actions with claims such as "All is fair in love and war."...
>
> Arguments of this kind are sometimes to the point, but they are peculiarly likely to function as rationalization. They obscure reasoning and invite bias of every kind. They often exaggerate

> the crisis at hand, and the conspiratorial nature of opponents, and they underestimate the adequacy of other methods of investigation. Wallraff could not, in effect, demonstrate either conspiracy or crisis in the newspaper he was investigating, nor show why the many shady practices that he uncovered could be exposed only by means of infiltration. For journalists as for social scientists and other probers, the infiltrator is often seeking shortcuts for which the more experienced have no need.

In *Lying*, Dr. Bok explains that liars want a "free-rider" status,

> giving them the benefits of lying without the risks of being lied to. Some think of this free rider status as for them alone. Others extend it to their friends, social group, or profession. This category of persons can be narrow or broad; but it does require as a necessary backdrop the ordinary assumptions about the honesty of most persons. The free-rider trades upon being an exception, and could not exist in a world where everybody chose to exercise the same prerogatives. *Id.* at 23.
>
> ...
>
> How is the liar affected by his own lies? The very fact the he *knows* he has lied, first of all, affects him. He may regard the lie as an inroad on his integrity; he certainly looks at those he has lied to with a new caution. And if they find out that he has lied, he knows that his credibility and the respect for his world has been damaged. *Id* at 24.
>
> ...
>
> The liar's self-bestowed free-rider status, then, can be as corrupting as all other unchecked exercises of power. There are, in fact, very few "free rides" to be had through lying. *Id* at 26.

Isn't this what the Ninth Circuit has afforded ABC — free-rider status?

> Veracity is not only in conflict with the other principles when lies are told. Some claim they lie so as to protect the *truth*. To lie for the sake of the truth — this is surely the most paradoxical of excuses.
>
> ...
>
> Once revealed, the gap is especially shocking in someone whose profession ideally requires a concern for truth. When judges and scientists are caught in fraud, the sense of betrayal is great. A fraudulent scientist goes against the most fundamental standards of science. *Id* at 84-85.

In as much as journalists are supposed to be the paragons of truth, then allowing them to lie is the ultimate conundrum from which there is no moral escape.

CONCLUSION

The dismissal by the district court should be reversed and this case should go to trial. The rule of the lower two courts effectively nullifies the federal wiretapping statute. Journalists may not commit crimes and torts to gather the news. How can it be said that ABC had an innocent intent when it secretly taped hundreds of persons in a private setting using fraud to do so, with no restrictions upon the taping whatsoever?[27]

Are we a nation of eavesdroppers? Can journalists commit crimes and torts just because they have a press card? Does the First Amendment immunize the crimes and torts because the information gets published? What about all the taping of the plaintiffs which was never shown on television? Can ABC tape anybody anywhere at anytime because there may be news if it does so?

How many more lives, careers and families must be ruined before this democracy accords respect to everyone in society? Being

---

[27] ABC thinks it can outsmart the United States Congress and the people of the United States. It is prime time for it to learn that news is not gathered at the expense of human dignity. Tasseled-loafer wearing producers hiding in New York skyscrapers, playing at being grown-up Hardy Boys and Nancy Drew, must subjugate their voracious thirst for ratings to the right to be left alone. This was no great expose, but as evidenced by the ruling by the California Supreme Court in *Sanders*, a fraud by ABC on the public.

on a hidden camera is a brutalization, a psychological beating from which no one ever recovers. It has been ABC's blood sport and only recently has the public begun to fight back.[28]

Never has this Court sanctioned as protected by the First Amendment an invasion of personal privacy by the media in gathering the news. Indeed, in *Cohen v. Cowles Media*, this Court staunchly refused to accord the media a special exemption from rules of general applicability. The lower courts startling misinterpretation of the Federal wiretapping statute runs counter to this philosophy and imputes to Congress a bizarre intent that contravenes, logic, law, and fundamental human values.

Privacy is an endangered fundamental freedom, a federal and state Constitutional right, and as each day goes by, we as a people cherish it more. This is the paradigm case. The statute will live or die depending on what you do. Lives, reputations, the will of Congress hang in the balance.

---

[28] The American public, fed up with what it increasingly views as unfair, inaccurate and sensational journalism, is paying less attention to mainstream news media and watching or reading with far less enthusiasm than ten years ago, according to a new nationwide poll.

> The public is especially critical of network news ... It found that only 26% of American say that they enjoy watching network news "a great deal," down sharply from 42% in a 1985 poll.
>
> Past polls have also found increasing public criticism of the news media but the latest Pew Center survey paints a much starker picture of press credibility and the public's growing alienation from the mainstream media.
>
> The survey comes as news organizations, as well as newspaper and network television executives, are studying ways to establish better rapport between the media and a public that is spending less time reading newspapers and watching television news. Favorable ratings for network television news have fallen steadily from 30% in 1985 to 27% in 1992 to just 15% this year registering a very favorable opinion. Network news viewership has also fallen sharply, with only 42% saying that they watch nightly network news regularly, compared with 60% in 1993.
>
> ...
>
> The majority of the public — 56% — now believes news stories are often inaccurate. In 1985, by contrast, 55% said news organizations generally got their facts straight. Nelson, "Major News Media Trusted Less," *Los Angeles Times*, March 21, 1997, page A21.

Respectfully submitted,
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(Any footnotes trail end of each document)

186 F.3d 1200

No. 97-55410

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARK SUSSMAN; KEN GERRIN; PERRY CARTER; SIMONE LUND; VANESE MCNEIL; AMIN A. FARUQI; BETTY KOSS; ROBERT BOZOYAN; LILIAN HEDRICK; EVANGELINE RAGASA; CHRISTOPHER ROGERS; PATRICIA HOPKINS; DERRICK C. LESHURRE; DEANNA WILLIAMS, Plaintiffs-Appellants,

v.

AMERICAN BROADCASTING COMPANIES, INC., dba KABC-TV Inc.; THOMAS ALBERT OETGEN; BOB CALO; RICHARD KAPLAN; WALTER PORGES; IRA ROSEN; STACY LESCHT; AMERICAN BROADCASTING COMPANIES, INC.; CLAYTON MCVICKER, Defendants-Appellees.

November 3, 1998, Argued and Submitted, Pasadena, California

August 18, 1999, Filed

COUNSEL:

Neville L. Johnson, Neville L. Johnson & Associates, Los Angeles, California, for the plaintiffs-appellants.

Steven M. Perry, Munger, Tolles & Olsen, Los Angeles, California, for the defendants-appellees.

JUDGES:
Before: Alex Kozinski and Andrew J. Kleinfeld, Circuit Judges, and Owen M. Panner, * District Judge. Opinion by Judge Kozinski.

OPINIONBY:
ALEX KOZINSKI

OPINION:

OPINION

KOZINSKI, Circuit Judge:
We decide whether ABC's surreptitious videotapings during an investigation of the Psychic Marketing Group could have violated *18 U.S.C. § 2511* (1994), the federal wiretapping statute.

I

ABC hired Stacy Lescht to pose as a psychic telephone advisor in order to gain access to the offices of the Psychic Marketing Group (PMG). While working in the Los Angeles office of the PMG, Lescht used various surveillance devices to record the activities around her. Some of these recordings were aired in a segment of the ABC News program Prime-Time Live.
Soon thereafter, two PMG employees who had been taped filed suit in state court alleging various causes of action, including invasion of privacy by photography.[1] The jury found for plaintiffs on this claim but the California Court of Appeal reversed. See *Sanders v. American Broad. Cos., 52 Cal. App. 4th 543, 60 Cal. Rptr. 2d 595, 599 (Cal. Ct. App. 1997).*[2] The California Supreme Court, in turn, reversed the Court of Appeal, holding that the covert taping of office conversations by a television reporter could be actionable as an invasion of privacy. See *Sanders v. American Broad. Cos., 20 Cal. 4th 907, 978 P.2d 67 (Cal. 1999).*

Prior to the Supreme Court's ruling, more than a dozen current and former PMG employees, plaintiffs here, filed a law-suit based on the same conduct as in Sanders; plaintiffs asserted, inter alia, claims for eavesdropping under *18 U.S.C. § 2511*.[3] Defendants subsequently removed the case to federal court. The district court granted defendants' motion for summary judgment and plaintiffs appeal.

II

Section 2511 reads in pertinent part:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such an interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d) (emphasis added). Because ABC was not acting under color of law, and because Lescht was always a party to the conversations being taped,[4] the case turns on the underscored portion of the statute, which asks whether the interception was "for the purpose of committing any criminal or tortious act." The district court ruled that it was not, because ABC had done the taping for news gathering purposes: "Where a journalist is party to a conversation, the recording of such a conversation for news gathering purposes is not criminal or tortious conduct within the meaning of the statute." If the district court interpreted section 2511 as containing a blanket exemption for journalists, we cannot agree. Congress could have drafted the statute so as to exempt all journalists from its coverage, but did not. Instead, it treated journalists just like any other party who tapes conversations surreptitiously.

The district court may have meant, however, that defendants were exempt because they had a lawful purpose for the surreptitious taping, namely news gathering. The court may have reasoned that any time the interception serves a lawful purpose, it perforce does not violate section 2511. But the existence of a lawful purpose does not mean that the interception is not also for a tortious or unlawful purpose. For example, assume that a news gathering organization secretly videotapes bedroom activities. Even though there may be a legitimate news gathering purpose (e.g., listening for "pillow talk" about some newsworthy event), public airing of such a tape may be illegal or tortious under state law. Under these circumstances, the taping could be for both a legitimate purpose (news gathering) and also an unlawful or tortious purpose (airing private intimate conduct). The existence of the lawful purpose would not sanitize a tape that was also made for an illegitimate purpose; the taping would violate section 2511.

Plaintiffs here have pointed to no state statute or caselaw indicating that it was tortious or illegal for ABC to air the tapings made by Lescht. In fact, the California Court of Appeal recently emphasized that "newsworthiness . . . is a complete bar to liability for publication of private facts and is evaluated with a high degree of deference to editorial judgment." *Marich v. QRZ Media, Inc., 73 Cal. App. 4th 303, 86 Cal. Rptr. 2d 406, 419 (Cal. Ct. App. 1999).* While plaintiffs have claimed that ABC's story was factually incorrect and unfair, they have never claimed it was not newsworthy. Nor do they argue that the tape was made for the purpose of committing some other subsequent crime or tort. Rather, plaintiffs point to Sanders and argue that the taping itself was tortious. If an otherwise lawful taping violates section 2511 when committed for a prohibited purpose, argue plaintiffs, the section must also be violated when the taping itself is illegal or tortious. This argument finds no support in the statute. Under section 2511, "the focus is not upon whether the interception itself violated another law; it is upon whether the purpose for the interception--its intended use--was criminal or tortious." *Payne v.*

Norwest Corp., 911 F. Supp. 1299, 1304 (D. Mont. 1995), aff'd in part and rev'd in part, *113 F.3d 1079 (9th Cir. 1997)*. See also *Deteresa v. American Broad. Cos., 121 F.3d 460, 467 n.4 (9th Cir. 1997)* (emphasizing the distinction between a taping that is itself tortious or criminal, and one carried out for the purpose of committing some other crime or tort). Where the taping is legal, but is done for the purpose of facilitating some further impropriety, such as blackmail, section 2511 applies. Where the purpose is not illegal or tortious, but the means are, the victims must seek redress elsewhere.

Although ABC's taping may well have been a tortious invasion of privacy under state law, plaintiffs have produced no probative evidence that ABC had an illegal or tortious purpose when it made the tape. We may affirm the district court on any basis supported by the record. See, e.g., *United States v. Albers, 136 F.3d 670, 672 (9th Cir. 1998)*.

AFFIRMED.

----------Footnotes----------

[1] It is unclear whether plaintiffs had pleaded this in their complaint, as the state trial judge sua sponte instructed the jury on the elements of the " 'sub-tort' of 'the right to be free of photographic invasion.' " *Sanders, 60 Cal. Rptr. 2d at 596.*

[2] The reversal was only as to one of the plaintiffs; the other one, Naras Kersis, died during the pendency of the proceedings, and so his suit was dismissed.

[3] Plaintiffs also raised various state law claims but none of those are at issue in this appeal.

[4] Plaintiffs argue that Lescht taped some conversations to which she was not a party, but they have presented no evidence supporting this claim.

CV 94-8524 JMI (Ex)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

971 F. Supp. 432

MARK SUSSMAN, et al.,
Plaintiffs,

v.

AMERICAN BROADCASTING COMPANIES, INC., et al.,
Defendants.

February 12, 1997, Decided

February 12, 1997, Filed

COUNSEL:
For MARK SUSSMAN, KER GERRIN, PERRY CARTER, SIMONE LUND, VANESE MCNEIL, AMIN A FARUQI, PERRY CARTER, III, FLORENCE CLOUD, BETTY KOSS, ROBERT BOZOYAN, LILIAN HEDRICK, EVANGELINE RAGASA, CHRISTOPHER ROGERS, PATRICIA HOPKINS, DERRICK C LESHURRE, DEANNA WILLIAMS, CANDICE A DONOFRIO, BILLIE YVONNE MAY, CLAYTON MCVICKER, plaintiffs: Neville L Johnson, Neville L Johnson & Associates, Los Angeles, CA.

For AMERICAN BROADCASTING COMPANIES INC dba KABC-TV Inc, BOB CALO, RICHARD KAPLAN, WALTER PORGES, IRA ROSEN, STACY LESCHT, defendants: Shari Cohen Rosenman, Christensen Miller Fink Jacobs Glaser Weil & Shapiro, Los Angeles, CA.

For AMERICAN BROADCASTING COMPANIES INC dba KABC-TV Inc, RICHARD KAPLAN, WALTER PORGES, IRA ROSEN, STACY LESCHT, defendants: Michael J O'Connor, White O'Connor Curry & Avanzado, Los Angeles, CA.

For SYLVIA CHASE, THOMAS ALBERT OETGEN, RICHARD KAPLAN, WALTER PORGES, IRA ROSEN, STACY LESCHT, AMERICAN BROADCASTING COMPANIES INC, defendants: Steven M Perry, Munger Tolles & Olson, Los Angeles, CA.

For BOB CALO, defendant: Andrew M White, Michael J O'Connor, White O'Connor Curry & Avanzado, Los Angeles, CA.

For AMERICAN BROADCASTING COMPANIES INC, defendant: Andrew M White, White O'Connor Curry & Avanzado, Los Angeles, CA.

JUDGES:
James M. Ideman, United States District Judge.

OPINIONBY:
James M. Ideman

OPINION:

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
IT IS HEREBY ORDERED:

Defendants' Motion for Summary Judgment came before this Court on Monday, February 10, 1997. After careful review and consideration, Defendants' motion is hereby GRANTED.

BACKGROUND

Plaintiffs are the owners and employees of Psychic Marketing Group ("PMG"), a company which provides psychic advice via a 900 telephone number service. Plaintiffs sued Defendants, a television network (ABC), its employees and journalists, for

conducting and broadcasting an undercover investigation of PMG's operation.

While working for the investigative news show "PrimeTime Live," Defendant Stacy Lescht ("Lescht") misrepresented to PMG that she worked at another office of PMG and was seeking work in Plaintiffs' offices. Using a hidden camera and microphone, Lescht recorded conversations with PMG employees about the operations of PMG. The business practices of PMG observed by Lescht inspired a subsequent "ambush interview," where an ABC reporter and camera crew entered the PMG premises and questioned PMG employees about PMG's operations. The footage from the hidden camera and the subsequent open interviews were then broadcast nationally.

After surviving several motions to dismiss, Plaintiffs filed a Third Amended Complaint on January 19, 1996. In their Third Amended Complaint, Plaintiffs allege: (1) Violation of Federal Eavesdropping Statute and Conspiracy to Eavesdrop *(18 U.S.C. § § 2511,* 2525); (2) Fraud and Conspiracy to Commit Fraud; (3) Unlawful Eavesdropping on or Recording of Confidential Communication (Cal. Penal Code § 632(a), 637.2); and (4) Spoliation of Evidence.

SUMMARY JUDGMENT STANDARD

Defendants move for summary judgment pursuant to Fed. R. Civ. P. 56. Summary judgment is proper where, based on the appropriate materials submitted, the moving party shows that there exists no genuine issue of material fact for a jury to decide. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* Where the moving party satisfies its burden, the non-moving party may not rest on its pleadings or allegations; it must set forth specific facts showing that no genuine issue of material fact exists. Fed. R. Civ. P. 56(e).

STATE STATUTORY CLAIMS

Defendants argue, and Plaintiffs now concede, that Plaintiffs' state statutory causes of action for Unlawful Eavesdropping on or

Recording of Confidential Communication (Cal. Penal Code § 632(a), 637.2) are time-barred by the statute of limitations. Therefore, summary disposition is proper as to these claims.

DEFENDANT SYLVIA CHASE AND PLAINTIFFS CLOUD AND MAY ARE DISMISSED FROM THIS ACTION

Plaintiffs also concede that they have "no viable claims" against Defendant Sylvia Chase. Further, Mr. Neville Johnson, Plaintiffs' attorney, maintains that Plaintiffs Florence Cloud and Billie Yvonne May should be dismissed from this action. Accordingly, Plaintiffs May and Cloud are hereby DISMISSED WITHOUT PREJUDICE pursuant to Fed. R. Civ. P. 41(a)(2). All claims against Defendant Chase are hereby DISMISSED WITH PREJUDICE.

FRAUD AND CONSPIRACY TO COMMIT FRAUD

The remaining Plaintiffs assert against Defendants Lescht and Oetgen common law causes of action for fraud and conspiracy to commit fraud. In the Third Amended Complaint, Plaintiffs allege that the intrusions caused by Defendants Oetgen and Lescht's surreptitious recordings gives rise to damages.[1] In California, the elements of fraud are: (1) a misrepresentation of fact; (2) made with knowledge of its falsity (scienter); (3) made with the intent to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Magpali v. Farmers Group, Inc., 48 Cal. App. 4th 471, 55 Cal. Rptr. 2d 225, 233* (2 Dist. 1996).

Defendants first argue that Plaintiffs cannot prove a claim of fraud because no resulting damage has been shown. Plaintiffs contend to the contrary. See Declarations of Perry Carter, et al. In this Court's opinion, however, this is a non-genuine issue of fact which must be resolved in favor of Defendants on summary judgment. Defendants have submitted substantial deposition testimony which clearly shows that Plaintiffs admit that their alleged damages in this action were caused by the ABC broadcast, not by the intrusions of Lescht and Oetgen. See Dec. Of Steven M. Perry. In deposition after deposition, Plaintiffs state in frank terms that their

damages were caused *solely* by the ABC broadcast and by nothing else. Id.

In response, Plaintiffs submit ten declarations, taken after Plaintiffs depositions and created solely for the purpose of this motion. See Decs. Of Perry Carter, et al. Each declaration contains identical language and directly contradicts prior deposition testimony. In these declarations of convenience, Plaintiffs attempt to salvage a cause of action that they have all but admitted do not exist.[2] Therefore, Plaintiffs' last-minute declarations do not create a triable issue of fact for a jury to decide.

Also, Defendants point out another valid reason to grant summary judgment. Defendants argue that Plaintiffs' fraud claims are time-barred by the one year statue of limitations as stated in Cal. Code Civ. Pro. § 340(3). Generally, the statute of limitations is three years for claims of fraud. Cal. Civ. Pro. Code § 338(d). However, the statute of limitations rule to be applied hinges on the essential "nature of the right sued upon or the principal purpose of the action, not by the form of the action or the relief requested." *Barton v. New United Motor Co., 43 Cal. App. 4th 1200, 1207* (1 Dist. 1996). While Plaintiffs make claims of fraud and conspiracy to commit fraud, their claims in essence hinge on the invasion of privacy alleged. "Plaintiffs would never have engaged in any conversations with and revealed any information to Lescht, Bell, Hill, and Oetgen had they known the truth behind the false representations." Third Amended Complaint, P 40. While wrapped in the rubric of fraud, Plaintiffs' claims more accurately assert personal privacy interests, and the one year statute of limitations should apply. Cal. Code Civ. Pro. § 340(3). Accordingly, because Plaintiffs did not file the Complaint until 19 months after the ABC broadcast aired, these claims are time-barred.

FEDERAL EAVESDROPPING CLAIMS

Plaintiffs also assert civil causes of action pursuant to *18 U.S.C. § § 2511* and 2525, which prohibit unlawful eavesdropping under federal law. These claims, however, are meritless. Federal law provides that it shall not be unlawful for a person to intercept wire

or oral communications where that person is a party to the conversation, "unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or any State." *18 U.S.C. § 2511*(2)(d). In this case, each surreptitious taping was made by a party to the conversation. Therefore, Plaintiffs may only recover if they can show that the recordings were made for the purpose of committing a criminal or tortious act.

The legislative history of the Electronic Communications Privacy Act of 1986, amending *18 U.S.C. § 2511*, clearly indicates that where a journalist is party to a conversation, the recording of such a conversation for news gathering purposes is not criminal or tortious conduct within the meaning of the statute. In amending *18 U.S.C. § 2511*, the words "or for the purpose of committing any other injurious act" were stricken. Congress noted that courts had incorrectly interpreted this phrase to attach civil liability to a journalist who had recorded conversations to which it was a party. The 1986 amendment, therefore, was enacted specifically to protect such conduct from civil liability. S. Rep. No. 99-541, reprinted in 1986 U.S.C.C.A.N. 3555, 3571. Congress also noted that such a broad interpretation of the statute would chill the First Amendment right to a free press. 1986 U.S.C.C.A.N. at 3571. This Court strongly agrees with that conclusion. n3 Such an interpretation of the statute would "place[] a stumbling block in the path of even the most scrupulous journalist." Id. Therefore, it seems clear that Plaintiffs' claims for relief under the federal eavesdropping statute have no merit in law, making summary disposition appropriate.

SPOLIATION OF EVIDENCE

Each of the Plaintiffs asserts spoliation of evidence claims against Defendants ABC and Oetgen. It is well settled, however, that the tort of spoliation of evidence applies only to the "destruction of evidence needed for prospective civil litigation." *Velasco v. Commercial Bldg. Maintenance Co., 169 Cal. App. 3d 874, 877 (2 Dist. 1985, 215 Cal. Rptr. 504).* Therefore, because summary disposition is proper as to each of Plaintiffs' other claims,

Plaintiffs' spoliation claims must also be dismissed, for there is no longer be any *prospective* civil litigation to which such claims could attach.

CONCLUSION

For the reasons mentioned above, Defendants' motion for summary judgment is hereby GRANTED.

IT IS SO ORDERED.

DATED: February 12, 1997

James M. Ideman

United States District Judge

JUDGMENT

IT IS HEREBY ORDERED:

Defendants' Motion for Summary Judgment came before this Court for review on Monday, February 10, 1997. In the Order filed herewith, this Court GRANTED Defendants' motion. This Court has determined that no triable issue of fact remains and that Defendants are entitled to judgment as a matter of law.

IT IS SO ORDERED.

DATED: February 12, 1997

James M. Ideman

United States District Judge

----------Footnotes----------

[1] On August 1, 1995, this Court ruled that all damages arising from the ABC broadcast were time-barred by the Uniform Publication Act. Therefore, Plaintiffs have alleged fraud damages based on the "intrusions" of Oetgen and Lescht. On December 13, 1995, these claims survived a motion to dismiss, though the Court noted that there appeared to be a "paucity of evidence" with respect to Plaintiffs' allegations.

[2] Plaintiffs' counsel's elastic concept of the truth is best illustrated in the following deposition passage:

Defense Counsel: When did you stop working at PMG entirely?

Donofrio: I took a leave of absence in October of 1993, and I was terminated in February of 1994, after I asked for my leave to be extended. Should I not be saying this?

Plaintiffs' Counsel: No, you're supposed to say --

Donofrio: Okay, because, I mean, I --

Defense Counsel: You're supposed to say everything that's truthful.

Deposition of Candice A. Donofrio, Sept. 27, 1996, p.32.

[3] For the same reason, Plaintiffs' fraud claims cannot survive summary judgment, as enforcement of such a civil claim at common law would trigger state action that would chill the First Amendment guarantee of a free press. See *New York Times v. Sullivan, 376 U.S. 254, 265, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964).*

Sec. 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

No. 99-840

IN THE

Supreme Court of the United States

MARK SUSSMAN, KER GERRIN, PERRY CARTER, SIMONE LUND, VANESE MCNEIL, AMIN A. FARUQI, BETTY KOSS, ROBERT BOZOYAN, LILIAN HEDRICK, EVANGELINE RAGASA, CHRISTOPHER ROGERS, PATRICIA HOPKINS, DERRICK C. LESHURRE, DEANNA WILLIAMS, CANDICE A. DONOFRIO, CLAYTON A. MCVICKER,

Petitioners,

v.

AMERICAN BROADCASTING COMPANIES, INC., THOMAS ALBERT OETGEN, STACY LESCHT, IRA ROSEN, RICHARD KAPLAN, WALTER PORGES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' STATEMENT PURSUANT TO RULE 29.6

Respondent American Broadcasting Companies, Inc. is a wholly-owned subsidiary of ABC, Inc., which is a wholly-owned subsidiary of Disney Enterprises, Inc., which is a wholly-owned subsidiary of The Walt Disney Company, which is a publicly held company.

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INTRODUCTION

A unanimous panel of the Ninth Circuit Court of Appeals held that respondents' actions did not violate section 802 of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. § 2511 (1994). Petitioners ask this Court to review that determination primarily because it is supposedly in conflict with the decisions of three other circuits. Respondents file this brief in order to demonstrate that no such conflict exists and that no important and unsettled issue of federal law is raised by the petition.

RESPONDENTS' STATEMENT OF THE CASE

The petitioners in this action were employed by the Psychic Marketing Group ("PMG") as "psychic advisors" who provided advice to telephone callers for a fee. As part of an investigation by American Broadcasting Companies, Inc. ("ABC") into PMG's telemarketing practices, ABC asked a young intern named Stacy Lescht to obtain a job as a "psychic telephone advisor" at PMG. In September 1992, while working in PMG's Los Angeles offices, Ms. Lescht surreptitiously recorded her conversations with some of the petitioners.

On February 18, 1993, ABC's "PrimeTime Live" news program included a story about the psychic telemarketing industry and PMG. The report included some of the videotape footage shot by Ms. Lescht at PMG. More than a dozen PMG employees and former employees initiated this suit against ABC and others in September 1994, although only a few of the plaintiffs had actually been shown in the broadcast. The plaintiffs asserted various state law claims and a claim for federal statutory eavesdropping pursuant to 18 U.S.C. § 2511.

In February 1997, the District Court granted the defendants' motion for summary judgment as to all claims. Although plaintiffs initially appealed from the judgment in its entirety, they subsequently abandoned their appeal with respect to their state law claims. The sole issue addressed by the Ninth Circuit, therefore, was whether the District Court had correctly held that plaintiffs had failed to come forward with evidence sufficient to support a verdict in their favor on the essential elements of their federal eavesdropping claim.

In an opinion authored by Judge Kozinski on behalf of a unanimous panel, the Ninth Circuit affirmed the entry of summary judgment. *See Sussman v. American Broadcasting Companies, Inc.*, 186 F.3d 1200 (9th Cir. 1999). The Court of Appeals' opinion began by setting out the relevant statutory provision, 18 U.S.C. § 2511(2)(d):

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such an interception *unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.*

Id. at 1201-2 (emphasis in opinion).

The Court then noted that because Ms. Lescht was always a party to the conversation being taped, the case turned on the underscored portion of the statute, which asked

whether the taping was "for the purpose of committing any criminal or tortious act." *Id.* at 1202. The Court rejected the notion that all that ABC need show to escape liability is that a purpose of the taping was to gather newsworthy material. Instead, the Court held that plaintiffs could prevail if they established that *one* of ABC's purposes in taping the conversations was to commit a crime or tort. *Id.*[1] The Court held that summary judgment was nevertheless proper because "plaintiffs have produced no probative evidence that ABC had an illegal or tortious purpose when it made the tape." *Id.* at 1203.

The Court of Appeals also considered the legal argument that petitioners advance in their petition: that liability is automatically established under 18 U.S.C. § 2511 if the taping *itself*, regardless of its purpose, is illegal or tortious under state law. *Id.* at 1202-3. The Court rejected this contention:

> This argument finds no support in the statute. Under section 2511, "the focus is not upon whether the interception itself violated another law; it is upon whether the purpose for the interception — its intended use — was criminal or tortious." *Payne v. Norwest Corp., 911 F.Supp. 1299, 1304 (D. Mont. 1995), aff'd in part and rev'd in part, 113 F.3d 1079 (9th Cir. 1997).*

1. Petitioners repeatedly misrepresent this holding by the Court in their petition. They contend that the Court of Appeals held that 18 U.S.C. § 2511(2)(d) "immunizes" and gives a "free pass" to any media defendant who merely claims that one of its purposes was newsgathering. Petition, pp. i, 2, 22. As noted above, the Court of Appeals in fact rejected that very argument. *Sussman*, 182 F.3d at 1202.

> *See also Deteresa v. American Broad. Cos., 121 F.3d 460, 467 n.4 (9th Cir. 1997)* (emphasizing the distinction between a taping that is itself tortious or criminal, and one carried out for the purpose of committing some other crime or tort). Where the taping is legal, but is done for the purpose of facilitating some further impropriety, such as blackmail, section 2511 applies. Where the purpose is not illegal or tortious, but the means are, the victims must seek redress elsewhere."

Id.

The plaintiffs did not seek rehearing by the panel or by the Circuit *en banc*.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS' DECISION IN THIS CASE AND ANY REPORTED DECISION FROM ANY OTHER COURT OF APPEALS

In their petition to this Court, petitioners seek review primarily because, they claim, other circuits have held that 18 U.S.C. § 2511 is violated whenever the making of a tape itself violates the statutory or common law of the state in which the tape was made. Petition, p. 18. Petitioners assert, erroneously, that the Seventh Circuit so held in *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345, 1353 (7th Cir. 1995). In *Desnick*, plaintiff brought suit against ABC in connection with an ABC news report about unnecessary ophthalmic surgery. In the course of its investigation, ABC had sent individuals to eye clinics who

had videotaped their encounters with clinic staff. *Id.* at 1348. Plaintiffs — a clinic and two of its surgeons — brought suit for defamation, fraud, trespass, and violation of federal and state eavesdropping statutes. On appeal from a Rule 12(b)(6) dismissal, the Seventh Circuit reversed the dismissal of the defamation claim, but affirmed the dismissal of the plaintiffs' other claims. *Id.* at 1355.

Petitioners assert that the Court of Appeals held in *Desnick* that 18 U.S.C. § 2511 would have been violated if plaintiffs there had been able to plead that the taping itself violated some other law or constituted a tort. Petition, p. 18. The Court did not so hold. Instead, Judge Posner's opinion for a unanimous panel in *Desnick* utilized the *precise* analysis employed by the Ninth Circuit in the instant case:

> The federal and state wiretapping statutes that the plaintiffs invoke allow one party to a conversation to record the conversation unless his purpose in doing so is to commit a crime or a tort or (in the case of the state, but not the federal, law) to do "other injurious acts." 18 U.S.C. § 2511(2)(d); Wis.Stat. § 968.31(2)(c). . . . The defendants did not order the camera-armed testers into the Desnick Eye Center's premises in order to commit a crime or tort. Maybe the program as it was eventually broadcast was tortious, for we have said that the defamation count was dismissed prematurely. But there is no suggestion that the defendants sent the testers into the Wisconsin and Illinois offices for the purpose of defaming the plaintiffs by charging tampering with the glare machine. The purpose, by the plaintiffs' own account, was to see whether the Center's

> physicians would recommend cataract surgery on the testers.

Desnick, 44 F.3d at 1353.

It is thus clear that both the Ninth Circuit in the instant case and the Seventh Circuit in *Desnick* looked to whether an *intended use* of the tape was a criminal or tortious one. This interpretation of 18 U.S.C. § 2511(2)(d) dates back at least to 1971, when the Eighth Circuit observed that

> it seems apparent from the context in which [18 U.S.C. § 2511] was enacted that the sort of conduct contemplated was an interception by a party to a conversation with an *intent to use* that interception against the non-consenting party in some harmful way and in a manner in which the offending party had no right to proceed.

Meredith v. Gavin, 446 F.2d 794, 799 (8th Cir. 1971) (emphasis added). The Seventh Circuit reached the same conclusion in *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956, 959 (7th Cir. 1982), a case involving a tape that had supposedly been made in an effort to acquire evidence for use in litigation. In affirming the district court's dismissal of a section 2511 claim, the Seventh Circuit, in another opinion by Judge Posner, pointed out that:

> . . . while it is even conceivable that [the party making the tape] if he had gotten the admissions he was hoping for would have used the recording to blackmail [the opposing party] rather than to bolster [his] antitrust suit and that this was his real purpose in making the recording, *no evidence*

> *of such an intent was presented below* — and [the opposing party] had the burden of proving unlawful purpose.

Id. at 960 (emphasis added). *See also Copeland v. Hubbard Broadcasting, Inc.*, 526 N.W.2d 402, 406 (Minn. App. 1995) (holding that even though journalists were purportedly trespassing when they taped portions of a story inside plaintiffs' home, no federal eavesdropping claim could be stated where the taping was not itself done for the purpose of committing the trespass).

In short, there is no split between the Courts of Appeal on the question presented by petitioners here. While petitioners also cite several district court opinions that supposedly conflict with the instant case, a purported conflict between a Court of Appeals decision and a district court decision is not among the conflicts listed in Rule 10 as providing a basis for review by writ of certiorari. Moreover, only one of the two district court opinions cited by petitioners appears to address the question presented here. In *Menda Biton v. Menda*, 796 F. Supp. 631 (D.P.R. 1992), the district court entered summary judgment on a federal eavesdropping claim brought by a stockbroker against several clients who had taped their telephone conversations with him. The defendants filed no papers in opposition to the stockbroker's motion for summary judgment. *Id.* at 632. The district court's short opinion granting the unopposed summary judgment motion states in part that section 2511(2)(d) makes it unlawful "to intercept a telephone conversation in *states* where such interception constitutes crime or tort." *Id.* at 633 (emphasis in original). The court cited no authority for this proposition. Respondents have been unable to locate any

subsequent opinion relying upon *Menda Biton* in this regard, and petitioners do not cite any such case.

The other district court opinion cited by petitioners is completely inapplicable here. In *Deal v. Spears*, 780 F. Supp. 618 (W.D. Ark. 1991), the defendants were not parties to any of the conversations that they taped. Accordingly, the portion of the statute at issue here was not discussed either in the district court's opinion or in the Eighth Circuit's opinion affirming the District Court's judgment for the plaintiff. *See Deal v. Spears*, 980 F.2d 1153 (8th Cir. 1992).

II. THE PETITION RAISES NO IMPORTANT AND UNSETTLED ISSUE OF FEDERAL LAW

A. State Law Provides Redress For The Types Of Wrongdoing Identified By Petitioners

As established above, there is no conflict between the Courts of Appeals on the question of law presented by this Petition. Instead, the Courts of Appeals that have applied 18 U.S.C. § 2511(2)(d) have each held, as the Court of Appeals did here, that "[w]here the purpose [of the taping] is not illegal or tortious, but the means are, the victims must seek redress elsewhere." *Sussman*, 186 F.3d at 1203. As this passage implies, the subjects of surreptitious recordings can, and often do, assert claims under *state* law for invasion of privacy or for violation of state statutes pertaining to electronic eavesdropping. Petitioners do not contend that these state statutes or common law rights are ineffectual; indeed, they point out that another subject of the same ABC broadcast at issue here obtained a substantial jury verdict in his favor "on the tort of intrusion." Petition, pp. 4-6 and n.7. State law thus provides a ready means to redress the various

torts and crimes identified by petitioners. The fact that the petitioners in *this* case allowed the limitations period on their state law claims to expire before bringing suit, *see* Petition, p. 17, does not justify the expansive interpretation of 18 U.S.C. § 2511 that they advance.

B. The Court Of Appeals' Interpretation Of 18 U.S.C. § 2511 Is Fully Consistent With Congressional Intent.

Petitioners also assert that review is appropriate here because the Court of Appeals' interpretation of 18 U.S.C. § 2511 "imputes to Congress a bizarre intent that contravenes logic . . . ," and they argue that the "will of Congress hang[s] in the balance." Petition, p. 29. In fact, the Court of Appeals' interpretation is fully consistent with Congress' desire, as reflected in a 1986 amendment to 18 U.S.C. § 2511, that section 2511(2)(d) should not act as a "stumbling block" in the path of journalists who record their own conversations. S. Rep. No. 99-541, 99th Cong. 2d Sess. (1986), p. 17, *reprinted at* U.S. Code Cong. & Admin. News 1986, p. 3571. The 1986 amendment eliminated language that had created liability for those who taped conversations "for the purpose of committing [an] injurious act." The Senate Report that accompanied the legislation stated that:

> Many news stores have been brought to light by recording a conversation with the consent of only one of the parties involved — often the journalist himself. Many news stories are embarrassing to someone. The present wording of section 2511(2)(d) not only provides such a person with a right to bring suit, but it also makes the actions of the journalist a potential criminal offense under Section 2511, even if the

> interception was made in the ordinary course of responsible news-gathering activities and not for the purpose of committing a criminal act or a tort.

Id.

In sum, when Congress last addressed 18 U.S.C. § 2511(2)(d), it *narrowed* its scope, after acknowledging that "many" news stores had resulted from surreptitious tape recordings by journalists. *Id.* It is thus highly unlikely that Congress intended that section 2511(2)(d) create automatic *federal* criminal liability for journalists or others whenever a *state's* statutory or common law barred surreptitious taping. In addition, since each of the Courts of Appeals that had applied section 2511(2)(d) prior to the 1986 amendment had looked to whether the *intended use* of the tape was criminal or tortious, Congress may be presumed to have had knowledge of, and to have approved, that interpretation of the statute. *See Lorillard v. Pons*, 434 U.S. 575, 580, 98 S. Ct. 866, 870 (1978).

Petitioners obviously disagree with the policy choices made by Congress, as demonstrated by their vitriolic attacks upon journalists who utilize recording devices. Petitioners' policy arguments should be addressed to Congress, however, or to state legislatures, not to this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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